**KURCHANG SINGH WEDHAWA SINGH**

**v.**

**PUBLIC PROSECUTOR**

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[CRIMINAL APPEAL NO. 52-41 OF 1987]
25 MAY 1989

***CRIMINAL LAW:*** *Rape - Attempted Rape - Intention to rape - Forcibly strips complaint who was stark naked - Accused stopped from proceeding further by arrival of Police - Whether offence of attempted rape committed - Criminal force in outraging modesty.*

The appellant was convicted in the Sessions Court, Klang on a charge of attempted rape and a second charge of robbery on 17 August 1985 on which he was sentenced to six years imprisonment and six years and six strokes of the rotan respectively and the sentences were to run concurrently. Hence this appeal.

**Held:**

**[1]** The plain meaning is that whether the evidence amounts to an attempt is a question of fact. In such cases, the Court must ask itself "was the irrestible inferences that the assailant intended to insert his penis into the girl's private parts" If a common sense approach is taken the question is "What were these assailants about to do?"

**[2]** The crux of the matter is proximity and rape would undoubtedly have taken place if the police had not intervened.

*[Appeal against conviction dismissed. Appeal of sentence varied.]*

**Cases referred to:**

*Tan Beng Chey v. PP [1966] 1 MLJ 173*
*Thangiah & Anor. v. PP [1977] 1 MLJ 79*
*R. v. Lucas [1981] 73 Cr App Rep 159*
*Peterson & Ors. v. R. [1970-80] 23 ALR 641*
*Alan Redpath [1967] 46 Cr App 319*
*Ramesh Chauhan [1981] 73 Cr App Rep 232*
*Teoh Hoe Chye v. PP [1987] CLJ (Rep) 386*
*PP v. Lai Pong Yuen & Ors. [1968] 1 MLJ 12*

**Legislation referred to:**

Penal Code, ss. 334, 354

*For the public prosecutor - Jalaludin*
*For the appellant - Kartar Singh; M/s. Bachan & Kartar*

**JUDGMENT**

**Mahadev Shankar J:**

In this criminal appeal the appellant's Counsel had made a somewhat startling proposition. It is that if a man having already stated it as his intention to rape a woman then forcibly proceeds to strip her stark naked, he cannot be convicted of attempted rape if at that moment he is stopped from proceeding further by the arrival of the police. It is submitted that in such a case all the law can do is to find him guilty of using criminal force to outraging her modesty.

The appellant was convicted in the Sessions Court Klang on a charge of attempted rape, and a second charge of robbery, on which he was sentenced to six years imprisonment and six years and six strokes of the rotan respectively. The sentences were to run concurrently.

Briefly the facts were as follows.

On 17 August 1985 the victim of these offences was a sales assistant. She was a Chinese girl, then aged 19. It is not necessary for her name to be disclosed in this judgment.

She finished work at about 9 p.m. at Damansara Jaya. Then she went to the bus stop at Kimisawa Complex Damansara Jaya to wait for a taxi. She was alone. A taxi arrived. She got into the back seat.

In the front were two men. The appellant was driving the taxi. Seated next to him was one Sithwanta Singh a/l Busata Singh. She told the driver she wanted to go to Petaling Garden.

Petaling Garden was quite a distance from Damansara Jaya. When the taxi moved the complainant smelt liquor. She also thought the driver and his companion appeared to be drunk. This was within two to three minutes of boarding. She became alarmed and told them to stop. They did not do so. Then she told them to go to SS2 instead since it was closer. But again they did not do so.

Soon after the taxi stopped at traffic lights. Sithwanta Singh climbed to the back seat and pointed a toy "gun" at the complainant's head. She panicked and screamed. Sithwanta Singh then hit her on the head and told her to keep quiet.

The taxi proceeded. Complainant says that both the appellant and Sithwanta Singh told her of a misunderstanding with her brother. They said that they caught her because they wanted revenge. When she said she had no brother and they had got the wrong person, both the appellant and Sithwanta Singh asked for money to get to Pakistan because the police were after them. Sithwanta Singh took her hand bag, wallet and wrist-watch. (Her evidence at the trial was that the wallet contained RM30 to RM40). She asked them to send her home but Sithwanta Singh caught her head and pushed it down so that she could not see where she was going. Both of them kept asking for money. She asked to be taken home but they said later.

She was then driven along the Kepong Road miles away from her original destination to a desolate mining area in Sungei Way. Here the taxi stopped.

Then both of them asked her if she was a virgin. If she was they said they would rape her. If not they won't. So she said she was not. Then one of them said if so why should she mind being raped.

Next they asked her to take off her clothes. She refused. So both of them hit her with their hands on her face. Then they said if she took off her clothes they would not rape her. So she took off her shirt. Both the appellant and Sithwanta Singh then started to touch her body. All three of them were in the back seat. Then they asked her to take off her bra. She complied. When she refused to take off her pants both of them hit her when she resisted and forcibly removed both her pants and her panties. Whenever she tried to say anything they hit her and told her not to make a noise. Both of them said they were going to have sex with her.

The complainant was stark naked by this time and both accused had started to touch her private parts and her body.

Before they could do anything more, the Police arrived. But the appellant's reaction was to jump to the driver's seat and try to start the car to make a getaway.

The police were there in ambush position because they had a previous report that a taxi HW 3111 was being used by two persons to commit rape upon their victims at that place. By chance the taxi actually arrived there. The number of the taxi had been covered with paper so as to show the number HW3 only. On entering the area the headlights of the taxi were switched off. The car then proceeded with its side lights and on getting to a concrete area it stopped. Then the side lights were also switched off. PW3 Sgt. Mohd. Sahar said that it was dark then and they could not actually see what was going on. After about ten minutes they got closer to the car. Then PW3 heard the screams of a woman coming from the car. He blew his police whistle to signal the four men in his team to charge the car. He shouted "Don't run, Police." Then he shone his torch in the direction of the taxi and was able to see by torchlight two persons in the back and one in front trying to start the car to get away. So he fired a warning shot. P/C Omar also shot up a front tyre to stop the car moving off. The doors of the car were opened and the accused persons were pulled out and placed under arrest.

PW3 testified that he observed Sithwanta Singh was half naked with his trousers to his knees. The Complainant was stark naked. The appellant however was then fully clothed and in the front seat of the car in the driver's seat.

They were taken to the Sungei Way Police Station where the complainant made a police report. There was nothing in the police report about the taking of the watch, handbag or wallet. But the appellant was found to have RM40 cash in his trousers pocket.

The trial commenced on 20 May 1987. Encik Karpal Singh was Counsel for Sithwanta Singh. Encik Kartar Singh appeared for the appellant who was second accused. Both accused were jointly charged firstly with attempted rape, alternatively with outraging modesty and secondly with robbery.

Complainant was the first prosecution witness. As soon as she had substantially completed her examination-in-chief, Encik Karpal Singh applied for an adjournment on the ground that there was a likelihood of change of plea. The case was adjourned to 6 August, when Sithwanta Singh pleaded guilty to the first charge and the second charge. He was then sentenced to five years imprisonment on each charge.

The trial then proceeded against the appellant alone on 6 October. The complainant was vigorously cross-examined and the prosecution called PW2 the photographer, PW3 Sgt. Mohamed Sahar, PW4 the Area Inspector ASP Husin bin Haji Omar and PW5 Inspector Rosli Dahlan the investigating officer in this case. The three policemen who accompanied PW3 to the ambush, the doctors who examined the complainant, the taxi owner, and two women police officers who were connected with this case were all offered to the defence but the Court was informed that they were not required and they were released. I have been informed by appellant's Counsel that the first accused, who had by then been sentenced, was in Court. The prosecution did not formally make him available. After a submission of no case the appellant was asked to enter into his defence. He did so but did not call any witnesses.

The appellant's defence in a nut shell was that he had acted under duress. The first accused lived quite close to the appellant in Puchong. When coming out of his house he saw Sithwanta Singh who boarded his taxi and sat in the front seat. From Puchong he drove to Damansara where he picked up the complainant. She said she wanted to go to Petaling Garden. Within

half a mile of Damansara Sithwanta Singh pulled out a "pistol" and pointed it at the appellant and told him to obey what he said. He became frightened and followed Sithwanta's instructions. Sithwanta then jumped into the rear seat and whilst holding the complainant down told him to drive the car to the mining area. The car was air-conditioned. On arrival at the scene he says he was asked to switch off the lights and the engine. As the air-condition was off the car become stuffy. Then he put down his mirror and saw Sithwanta struggling with the complainant. Shortly after that the police arrived and he was arrested. The claim of duress is backed up by allegations that Sithwanta pointed this pistol at him whilst he was in the front seat, after he jumped into the back seat, and yet again after the car had stopped at the mining area when Sithwanta Singh allegedly told him not to look at the back.

The "gun" in this case is a cheap plastic toy. The learned President gave a string of reasons why he thought this defence too fantastic to be believed.

The findings of the trial Court have been severely criticised by appellant's Counsel. But the question of credibility is eminently one for the trial Judge and I see no reason why I should interfere subject to some qualifications which I shall deal with shortly.

The main point of this appeal is that even if everything the complainant said is true the appellant cannot be said to have committed attempted rape.

In support of this appellant's Counsel relies very heavily on *Tan Beng Chey v. PP* [1966] 1 MLJ 173. This is a Singapore appellate decision when the Republic was part of the Federation of Malaysia. So it is said that I am bound by it. I do not think I need to embark on a consideration of the doctrine of *stare decisis* where political separation has occurred because this decision, which may have much to do with the eminence of the advocate who argued it, is clearly distinguinshable on the facts.

Tan had caught a woman in a track leaving Serangoon Garden Estate. He threatened her with a knife and got her behind some bushes. Here he took off his shorts and lowered his inner pants to his knees. Under threats she took off her samfoo coat and trousers but refused to take of her knickers. Whe he tried to pull them off she pushed him to the ground. He got up and threatened to kill her if she did not take off her knickers. She still refused. Then he asked her to participate in an act of masturbation which she refused to do. At this time a stranger appeared and the appellant ran away.

The critical difference between that case and the present one is that at no time did Tan state that his intention was to rape the complainant. All the evidence established was an invitation to acts of indecency. What is more she was able to match his strength and keep her knickers on.

So despite my reservations about this decision, I disagree with appellant's Counsel that the facts in the present appeal fell short of *Tan Beng Chye's* case.

Kurchang Singh and his accomplice were found by the trial Court to have abducted this girl from Damansara Jaya to Sungei Way for the avowed purpose of raping her. They both said they were going to do it. It was the timely arrival of the Police which prevented them from doing so.

*Thangiah & Anor. v. P.P.* [1977] 1 MLJ 79 at p. 81 reads:

> There are four stages in every crime. First an intention to commit the crime, secondly the preparation for its commission, thirdly the attempt to commit it and finally the actual commission of the crime. The mere forming of an intention to commit a crime and making preparations for its commission are not criminal acts and are not punishable under the law.

There must be some further overt act on the part of the offender which is directed towards the actual commission of the crime and which is immediately and not remotely connected with the crime in order to constitute an attempt within the meaning of s. 511 of the Penal Code. On the other hand a crime is not completed if something should happen when the attempt to commit is being made, breaking the chain of events which if not for the intervening interruption would have led to the consummation of the crime. In such an event the offender will be liable under s. 511 of the Penal Code.

Stephen's time-honoured definition of an attempt is valid and strong as ever today: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission if it were not interrupted." Each particular case must be decided on its merits. Whether the act of an offender would amount to an attempt to commit a crime or not must depend on the facts and circumstances of each case.

The plain meaning of this is that whether the evidence amounts to an attempt is a question of fact. In such cases the Court must ask itself to borrow the words of the trial Judge in *Tan Beng Chye*, "Was the irresistible inference that the assailant intended to insert his penis into the girl's private parts." If a common sense approach is taken the question is, "What were these assailants about to do?"

The crux of the matter is proximity. It would in my opinion be misleading to try and transpose cases of theft or commercial frauds, with cases of attempted rape. Rape would undoubtedly have taken place here if the police had not intervened.

I now turn to the second major ground in this appeal viz. the alleged absence of corroboration.

Here the learned Sessions Judge did warn himself of the need for corroboration. Even without it, he would have been prepared to accept the victim as a witness of truth. But the complaint is that he treated the Sergeant's evidence as corroboration when it was not.

The seeing eye looks not just at the jewel but also at its setting. So let it be said once more that corroboration does not have to be sufficient in itself, if believed, to prove that the offence has been committed. In other words, in the context of this case, it does not mean that PW3's evidence standing alone, must add up to an offence of attempted rape. If that were so the words "in some material particular" in the time honoured definition in *R. v. Baskerville* would be redundant. Corroboration must be independent evidence "which confirms in some material particular not only that the crime has been committed but also that the prisoner committed it."

Put simply it is independent evidence which tends to show that the story told by the complainant, Not that told by the accused, is the true account of what occurred.

Corroboration may come from the other prosectuion witnesses, or from the accused. Deliberate lies or incriminating conduct in a material particular can constitute corroboration. See *R. v. Lucas* [1981] 73 Cr App Rep 159. The abduction of the complainant from Damansara to Sungei Way was confirmed by the appellant himself. That the screams of the complainant and her state of total nudity also constitute corroboration because they have been testified to by an independent source is amply demonstrated by the decision of the full bench of the Federal Court of Australia in *Peterson & Ors. v. R* [1979-80] 23 ALR p. 641. That was a case of gang rape where it was unsuccessfully contended that the naked plight of the complainant from the gang rapists and her screams was not corroboration. The previous English authorities (especially *Alan Redpath* [1967] 46 Cr App Rep 319) are analysed at p. 651. We have since also had the case of *Ramesh Chauhan* [1981] 73 Cr App Rep 232.

The next point that was taken was that if these acts amounted to corroboration they only amounted to corroboration against Sithwanta Singh and not against the appellant. But the complainant's accusation was against both the accused as a single transaction. Her evidence therefore had to be taken as a whole against both accused. That the appellant was implicated in this shameful episode right from the start stems from the fact that care had been taken to block out the number of the taxi with paper, and he was the driver. He was in control of this vehicle and on his own testimony the vehicle must have stopped at the first traffic light between Damansara and SS 2 within minutes of this girl being picked up. There were several stops at traffic lights after that and he made no attempt to immobilise the car or get out of it. His story that Sithwanta Singh was able to terrify him with a toy gun by holding it in one hand, and strip the complainant with the other did not impress the learned Sessions Judge. As to separate independent corroboration against the appellant, if it were needed, there is the independent evidence that when the police arrived he tried to start the car and get away.

I must now turn to another criticism which is that the prosecution should have called Sithwanta Singh to give evidence as one of its witnesses and their failure to do so must result in an adverse inference being drawn against the prosecution under s. 114(g). This is certainly a novel proposition and I regret to say without any basis whatsoever. What witnesses it is the duty of the prosecution to call has already been the subject of *Teoh Hoe Chye v. PP* [1987] CLJ (Rep) 386. That is a Supreme Court decision which may be consulted for guidance as required. But to go further, Sithwanta Singh was a co-accused. He was charged jointly with the appellant and after he heard the evidence of the complainant, he pleaded guilty without even cross-examining her. I hold as a matter of law that there is no duty upon the prosecution to call a co-accused as a prosecution witness. But there is another dimension on this aspect of the matter.

A confession by an accused is not evidence against his accomplices that they committed the offence. But there is authority to say that the Court can rely upon such a confession to lend assurance to its conviction if there is other evidence to support it. See *Public Prosecutor v. Lai Pong Yuen & Ors.* [1968] 1 MLJ 12. The fact that Sithwanta Singh pleaded guilty to a charge of jointly committing attempted rape on the complainant, was not relied upon by the prosecution in proof of its case and the trial Judge independently of the plea of guilt by Sithwanta Singh was prepared to act on the other evidence before him. In these circumstances the omission to make Sithwanta Singh a witness by the prosecution or the defence is a neutral factor.

The trial Court accepted the complainant's evidence that her handbag, wallet and wristwatch was taken away from her. Sithwanta Singh's plea of guilt on the second charge confirmed this. But there was an unfortunate break in the chain of evidence here because the prosecution omitted to prove where these articles were recovered from when the two accused persons were arrested. So far as the appellant was concerned notwithstanding that there was strong evidence to indicate his complicity in the robbery as well, the subject matter of the offence had not been proved with the precision required in Criminal law. The sum specified was RM48 (perhaps a typographical error for RM40) and no evidence was led to link the money found in the appellant's pocket with the cash belonging to the complainant. Consequently the trial Judge should have found that it was unsafe to convict the appellant on the second charge and acquitted him thereon.

This robbery was only a subsidiary incident in the traumatic experience suffered by this young girl. The substantial attention of all parties was focussed on the attempted rape. But when it came to sentencing the substantial sentence was on the robbery charge, but from the trial Court's point of view the point may have been thought academic since the sentence were to run concurrently.

To put the record straight I now vary the finding of the Court below by substituting the sentence of six years imprisonment and six strokes of the rotan for the first charge of attempted rape against the appellant. I set aside the conviction against him on the second charge of robbery and order, with regret, that the RM40 found in his pocket to be returned to him.

Before I leave this matter there are a few further observations I must now make. Sithwanta Singh was only sentenced to five years imprisonment on each charge. It may be a matter for speculation if this appeal was inspired because Kurchang Singh was not only given a heavier sentence, but ordered to be whipped as well. After all both of them inflicted a degree of violence to the complainant with Sithwanta Singh taking a more active part in the physical molestation of this young girl. Justice certainly requires that this disparity be rectified. Certainly some accommodation should have been made for the fact that he pleaded guilty whereas the appellant was unrepentant and attempted to bamboozle the Court below, with a cock and bull story which the learned Sessions Judge rightly rejected outright.

The difference in attitudes was correctly reflected in slightly lesser prison sentence for Sithwanta Singh, but the whipping should have been meted out to him as well unless there were some very good reasons to the contrary.

Consequently in the exercise of my revisionary powers I call for the record relating to Sithwanta Singh's conviction and sentence to be brought up to this Court in order that he do show cause why he should not also suffer six strokes of the rotan.

The public interest obliges me to point out something else. The offence of using criminal force to outrage modesty under s. 354 of the Penal code is punishable only with imprisonment for two years and whipping. But rape is punishable with imprisonment for a term up to twenty years and a fine or to whipping. The sense of outrage which the law contemplates the latter is obvious, and the way things are going we cannot afford to be lax. Current trends to indicate a need to take a harsher view of sexual offences where criminal force has been used and it can be safely inferred that the intent was not just to outrage modesty but to commit rape.

This appeal, therefore, is dismissed, with a variation of the decision of the Court below as I have just indicated.

Also found at [1989] 2 CLJ 442